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June 17, 2020

Chairman Bob Burns
Commissioner Sandra D. Kennedy
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

RE: Rate Review and Examination of the Books and Records of Arizona
Public Service Company (APS or Company)
Docket No. E-01345A-19-0003

Dear Chairman Burns and Commissioner Kennedy,

This letter provides a brief summary of the Company's legal concerns surrounding your May 29, 2020 letters, including the "hold-harmless proposal" (hereafter the Proposal) contained in Chairman Burns' letter. At the June 18th Special Open Meeting, APS will be prepared to discuss alternatives to the Proposal, as well as share its concerns about certain assertions in your letters.¹

APS disputes that it has been or is overearning either as a matter of fact or as a matter of law,² or that its revenues are too high due to perceived shortcomings in its

¹ For clarity, APS notes that Decision No. 76374, cited in Chairman Burns' May 29, 2020 letter, pertains to APS's non-standard metering charges and does not address customer education, outreach or rates other than the fees to opt-out of standard metering. Decision No. 76295 was the primary decision in APS's last general rate case. It approved the Settlement Agreement agreed to by 29 parties and set the rates that are being charged today.

² The draft version of the Overland Consulting report that was released after the conclusion of the rate review proceedings conflicts with Overland's June 4, 2019 final report that formed the basis for Staff's recommendations in the rate review proceeding. Moreover, a closer examination of the draft reveals that it was not consistent with the findings and ruling of Commission Decision No. 76295, because among other things, it hypothesized a lower cost of equity and debt, did not properly consider all expenses for the period, and failed to consider fair value.

Customer Outreach Education Program.³ APS has been charging customers the rates set by this Commission in APS's last rate case. *See* Decision No. 76295. Those rates were conclusively determined to be just, reasonable, and in the public interest by a lawful majority of the Commission. They remain just and reasonable as a matter of law unless and until the Commission finds new rates to be just and reasonable only after notice and a hearing. Customers have not been harmed by APS's rates and, consequently, there is no basis for holding customers "harmless" or reopening the last rate case, especially given that the Company is in the middle of a new rate case ordered by the Commission that is set for hearing September 30, 2020.

The Proposal raises several significant legal concerns as Chairman Burns' letter recognizes. Any one of them should raise sufficient concerns as to warrant denial of the Proposal. The Commission has been previously advised of these concerns by its own Chief Legal Counsel. At the June 11, 2019 Open Meeting discussing the APS Rate Review, Counsel advised that going back to prior rates or making APS's rates interim and subject to refund is prohibited because it would violate the Arizona Constitution and is retroactive ratemaking.⁴

First, the Commission cannot order retroactive ratemaking under Arizona law. Rate setting is a prospective activity. Rates are set in a general rate case using a historical test year and the fair value of a utility's property as required by the Arizona Constitution. The Commission must use this information to set just and reasonable rates that will be fair to customers and sufficient to recover a utility's costs and provide a reasonable rate of return on the Company's equity. It is well-established that when the Commission approves a rate and the rate becomes final, as it did here, the Commission may not later make a retroactive determination of a different rate and require reparations.⁵ It is also axiomatic that, between rate cases, a utility's revenues (as well as its expenses) will fluctuate based upon overall levels of economic activity, customer growth, weather, and

³ Having customers select a rate plan other than their most economical plan, is not evidence of whether APS is overearning. In APS's last rate case, rates were designed based on a projection that 53% of customers would select their most economical plan. Today, approximately 49% of customers are on their most economical plan. In addition, for a significant majority of customers, the cost difference between their most economical plan and the plan they are on is minimal.

⁴ APS Rate Review, Docket No. E-01345A-19-0003, June 11, 2019 Open Meeting, Trans. at pp. 62-65.

⁵ *See Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 124 Ariz. 433, 436, 604 P.2d 1144, 1147 (App. 1979), citing *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 4 U.S. 370, 389 (1932); *El Paso & S.W.R. Co. v. Ariz. Corp. Comm'n*, 51 F.2d 573, 577 (D. Ariz. 1931).

other factors. Arizona law does not permit the Commission to make retroactive determinations or refunds when revenues or expenses vary between cases when a utility charges its lawfully-approved rates.⁶ The appropriate approach as it relates to both of these instances is for the utility to submit, and the Commission to process a new rate case, which is currently underway consistent with the Commission's decision in the Rate Review docket. *See* Decision No. 77270.

Second, there is no legal or factual basis to use the interim rate doctrine to reduce APS's approved rates or make the approved rates interim and subject to refund. Interim rates are a mechanism historically used under Arizona law to effect a temporary rate *increase*, during an emergency, involving the financial health of the utility, pending the setting of permanent rates.⁷ Interim rates are subject to potential refund upon the conclusion of a rate case and may require the utility to post a bond in the event the increase must be refunded. There is no precedent allowing for interim rate reductions. The use of interim rates to decrease just and reasonable rates that were properly authorized in a full rate case violates the Arizona Constitution, the statutory requirements for the amendment or revocation of a final Commission decision, and APS's right to due process.⁸ Similarly, the Commission may not use interim rates to correct perceived mistakes or to challenge the rates set in APS's last rate case. The Arizona Supreme Court has made clear that when there is a final conclusive decision on a matter an "agency may not later on its own initiative or as the result of collateral attack make a retroactive determination of a different rate [from the final rate] and require reparations."⁹

Finally, the Commission's authority under A.R.S. § 40-252 to "rescind, alter or amend any order or decision made by it," is not absolute. Not only must due process be afforded to affected parties, but any resulting changes made by the Commission can only be prospective in nature. The statute does not trump the Constitutional prohibition against retroactive ratemaking. In addition, due process requires substantive and procedural safeguards before the Commission can rescind, alter or amend any of its decisions or orders, including meaningful notice to all those whose interests will be affected and the opportunity to be heard.¹⁰ More importantly, the Commission must conduct a hearing, so

⁶ *See Scates v. Ariz. Corp. Comm'n*, 118 Ariz. 531, 534-35 (App. 1978); *see also Residential Util. Consumer Office v. Ariz. Corp. Comm'n*, 199 Ariz. 588, 591-93 (App. 2001); *Pueblo Del Sol Water Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 285, 287 (App. 1988).

⁷ *See Scates*, 118 Ariz. at 535-36.

⁸ *See Residential Util. Consumer Office*, 199 Ariz. at 593; *Scates*, 118 Ariz. at 533.

⁹ *Mountain States*, 124 Ariz. at 436, 604 P.2d at 1147, citing *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 389 (1932).

¹⁰ *See* A.R.S. § 40-252. *See also Gibbons v. Ariz. Corp. Comm'n*, 95 Ariz. 343, 347 (1964).

that APS and affected parties may present evidence. APS must be given sufficient time to prepare a defense, as well as the opportunity to present evidence and examine adverse witnesses in a hearing, to controvert assertions of alleged noncompliance or that a decision should be rescinded, altered or amended.

In this particular instance, another consideration in addition to APS's due process rights, is the negative consequences of attempting to change the consideration for and terms of the Settlement Agreement, agreed to by 29 parties and approved in Decision No. 76295. Any potential action by the Commission to disturb that Decision or the rates determined to be just and reasonable therein, necessarily also implicates the due process and contractual rights of those settling parties, any of whom may withdraw from the agreement if material changes are made. Moreover, recession or modification of Decision No. 76295 does not serve the public interest. The rate case resulted in tremendous public benefits, including a program to expand access to utility-owned rooftop solar for low- and moderate-income Arizonans, Title I Schools, and rural governments; continuation of a buy-through rate for industrial and large general service customers; continuation of crisis bill assistance funds for low-income customers; more off-peak hours and holidays for time-differentiated rates; and a mechanism to pass-through the benefits of tax reform to customers, among others.

We look forward to discussing this matter together, with our suggested alternatives to the Proposal, more fully at the Special Open Meeting on June 18th. APS is committed to working with you to find a solution, consistent with the law, that can allow us to move forward in a more positive manner for our customers and the Company.

Sincerely,

/s/ Melissa M. Krueger

Melissa M. Krueger

MMK

cc: Docket Control
Robin Mitchell